

OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)	
ADMINISTRATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 02-0949
)	
HARBOUR HEALTH CENTER,)	
)	
Respondent.)	
<hr/>)	
AGENCY FOR HEALTH CARE)	
ADMINISTRATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 02-1299
)	
CANA II CORPORATION, d/b/a)	
HARBOUR HEALTH CENTER AT SOUTH)	
PORT SQUARE,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in these consolidated cases on June 19, 2002, in Port Charlotte, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dennis L. Godfrey, Esquire
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For Respondent: Karen L. Goldsmith, Esquire
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STATEMENT OF THE ISSUES

DOAH Case No. 02-0949: Whether Respondent's licensure status should be reduced from standard to conditional.

DOAH Case No. 02-1299: Whether Respondent committed the violation alleged in the Administrative Complaint dated February 19, 2002, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

By letter dated November 26, 2001, Harbour Health Center ("Harbour Health") was notified by the Agency for Health Care Administration ("AHCA") that its Skilled Nursing Facility license had been subjected to a rating change from "standard" to "conditional" as a result of one Class II deficiency found in a licensure and certification survey completed on October 25, 2001. Harbour Health timely filed an Election of Rights on December 17, 2001, disputing the allegations of fact and contesting the proposed Agency action. On February 19, 2002, Harbour Health filed an Amended Petition for Formal Administrative Hearing. On March 6, 2002, AHCA forwarded the matter to the Division of Administrative Hearings ("DOAH") for

assignment of an Administrative Law Judge and conduct of a formal hearing. This matter was assigned DOAH Case No. 02-0949 and set for hearing on May 3, 2002.

By Administrative Complaint dated February 19, 2002, AHCA notified Harbour Health of its intent to impose a civil penalty of \$2,500 for the Class II deficiency found in the survey completed on October 25, 2001. Harbour Health timely filed a Petition for Formal Administrative Hearing contesting the proposed Agency action. On April 1, 2002, AHCA forwarded the matter to DOAH for assignment of an Administrative Law Judge and conduct of a formal hearing. This matter was assigned DOAH Case No. 02-1299. On April 9, 2002, Harbour Health filed a Motion to Consolidate, which was granted by order dated April 15, 2002. The consolidated cases were set for hearing on June 19, 2002. The final hearing took place on that date.

At the formal hearing, AHCA presented the testimony of Diane Ashworth, a registered nurse ("RN") for the Agency and expert in nursing practices and procedures, and Lori Riddle, a public health nutrition consultant for the Agency and expert in dietetics and nutrition. AHCA's Exhibits 1 through 19 were accepted into evidence.

Harbour Health offered the testimony of Catherine Rolin, a licensed practical nurse ("LPN") working as a restorative nurse at Harbour Health; Diane Ayala, a certified nursing assistant

("CNA") working as a restorative aide at Harbour Health; Marie Mulcahy, an RN working at Harbour Health as a unit manager; Cheryl Cobb-Tollis, an RN and expert in nursing with a specialty in gerontology; and Deborah Blackburn, a consultant dietician at Harbour Health and expert in nutrition. By stipulation of the parties, Harbour Health submitted the deposition testimony of Michael Brinson, M.D., the attending physician of the resident whose care was at issue in these proceedings. Harbour Health's Exhibits 1 through 6 and 9 through 16 were accepted into evidence.

A Transcript of the proceeding was filed at the Division of Administrative Hearings on August 5, 2002. Both parties timely filed Proposed Recommended Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. AHCA is the state Agency responsible for licensure and regulation of nursing homes operating in the State of Florida. Chapter 400, Part II, Florida Statutes.

2. Harbour Health operates a licensed nursing home at 23013 Westchester Boulevard, Port Charlotte, Florida.

3. The standard form used by AHCA to document survey findings, titled "Statement of Deficiencies and Plan of

Correction," is commonly referred to as a "2567" form. The individual deficiencies are noted on the form by way of identifying numbers commonly called "Tags." A Tag identifies the applicable regulatory standard that the surveyors believe has been violated and provides a summary of the violation, specific factual allegations that the surveyors believe support the violation, and two ratings which indicate the severity of the deficiency.

4. One of the ratings identified in a Tag is a "scope and severity" rating, which is a letter rating from A to L with A representing the least severe deficiency and L representing the most severe. The second rating is a "class" rating, which is a numerical rating of I, II, or III, with I representing the most severe deficiency and III representing the least severe deficiency.

5. On October 22 through 25, 2001, AHCA conducted an annual licensure and certification survey of Harbour Health, to evaluate the facility's compliance with state and federal regulations governing the operation of nursing homes.

6. The survey team alleged several deficiencies during the survey, only one of which is at issue in these proceedings. At issue is a deficiency identified as Tag F325 (violation of 42 C.F.R. Section 483.25(i)(1), relating to maintenance of acceptable parameters of nutritional status).

7. The deficiency alleged in the survey was classified as Class II under the Florida classification system for nursing homes. A Class II deficiency is "a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services." Section 400.23(8)(b), Florida Statutes.

8. The deficiency alleged in the survey was cited at a federal scope and severity rating of G, meaning that the deficiency was isolated and caused actual harm that is not immediate jeopardy.

9. Based on the alleged Class II deficiency in Tag F325, AHCA imposed a conditional license on Harbour Health, effective October 25, 2001. The license expiration date was August 31, 2002.

10. The survey allegedly found a violation of 42 C.F.R. Section 483.25(i)(1), which states:

(i) Nutrition. Based on a resident's comprehensive assessment, the facility must ensure that a resident--

(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible. . . .

This requirement is referenced on Form 2567 as "Tag F325."

11. The survey found one instance in which Harbour Health allegedly failed to ensure that a resident maintained acceptable parameters of nutritional status. The surveyor's observation on Form 2567 concerned Resident 5, or "R-5":

Based on observations, record review and staff interviews, the facility failed to maintain acceptable parameters of nutritional status and did not use all possible interventions, to prevent an unplanned, severe weight loss (7.8 percent in a two month period) for 1 (Resident 5) of 20 active sampled residents.

The findings include:

1. During her lunch on 10/22/01 at approximately 12:20 P.M., Resident 5 was observed clinching her teeth together making it difficult to get food into her mouth. Resident 5 was observed on 10/23/01 at 12:30 P.M., taking a limited amount of thickened liquids from her nose cup, and clinching her teeth together making feeding her more difficult. Resident 5 was observed 5:25 P.M. until 5:55 P.M. on 10/23/01, taking small sips from the nose cup and clinching her teeth together making it very difficult for the Certified Nursing Assistant (CNA) to feed her 25 percent of her meal. These observations were made in the assisted dining room on A-Wing.

2. Record review of Resident 5's chart, documents 5/1/01 she weighed 127 pounds. On 7/2/01 and again on 7/16/01, her weight was documented 117 pounds. This is a severe weight loss of 7.8 percent in a two month period. Review of the resident's care plan dated 7/18/01, revealed the resident's nutrition problem was "Res. is on a puree diet with thickened liquids-- is continuing to lose weight-- is terminal-- weight is down 6 pounds for the month-- on weekly

weight-- consumes 25-50 percent of her meals-- small portions at lunch-- super cereal on breakfast tray and Carnation Instant Breakfast on other trays. Resident can be combative during meals-- resists any attempt to assist her with eating-- is very difficult to feed."

Approaches to address the problem included consult with Registered Dietician as needed and to monitor labs.

Further review of the care plan included the problem: "Resident is on psychotropic meds for dementia with psychosis as evidenced by . . . increased agitation and resisting care." Review of the resident's physician orders reveal the resident began receiving Risperdal in July 2001 for the diagnosis of psychosis. The record also revealed that the resident was given a terminal status in January 2001.

During an interview at 5:20 P.M. on 10/23/01, regarding Resident 5's evening meal being delivered after the other 3 residents at her table, the Certified Nursing Assistant stated, "She don't eat nothing anyway."

Interview with CDM (Certified Dietary Manager) and Consulting Dietician on 10/23/01 at approximately 4:45 P.M., regarding resident's severe weight loss and limited nutritional intake, revealed that the Consulting Dietician stated she was unaware of this resident. The CDM stated the resident clinches her teeth, refuses food, and they have tried everything else. She stated that the resident was terminal and that the family did not want a tube feeding placed. The resident was put on thickened liquids by a speech therapist in 1998 for dysphagia, but there had been no speech therapy follow-up. They confirmed

that no psychiatric consult was ordered since the care plan was developed, despite continued behaviors during feeding.

An interview was conducted with the CDM joined by the DON regarding Resident 5's weight loss and possible interventions on 10/24/01 at 3:05 P.M. It was identified that no routine snacks were ordered, no psychiatric follow-up nor speech therapy follow-up, nor medication adjustments had been done during May 2001 through July 2001. The CDM stated that the facility only acknowledges a 5 percent weight loss at an interval of 1 month, and 10 percent at a 6 month interval as significant, but would not look at a 7.5 percent because it would not trigger on the Minimum Data Set.

On 10/24/01 at 3:55 P.M., during an interview with the Unit Manager regarding Resident 5, she stated there was no psychiatric or mental health evaluation ordered, it was only on her care plan.

12. Diane Ashworth was the survey team member who recorded the observation of R-5. Ms. Ashworth based her findings on her observations of R-5, a review of the resident's medical records, and interviews with Harbour Health staff.

13. R-5 was a 92-year-old female who had resided at Harbour Health since 1998. She suffered from dementia with psychosis, in particular end-stage Alzheimer's disease. Her worsening condition caused her physician to request a neurological consultation in January 2001. The consulting neurologist diagnosed her condition as terminal. R-5 was

severely impaired cognitively, and was completely dependent on Harbor Health staff for all of her care. R-5 was unable to feed herself.

14. For over three years, Harbour Health has implemented a "restorative dining" program for residents with eating problems. In the restorative dining program, the resident is taken to a quiet area and given one-to-one attention by a CNA during meals. R-5 has been in the restorative dining program since its introduction.

15. During her entire stay at Harbour Health, R-5 was very difficult to feed. She would clench her teeth, cover her mouth and push away. At times she would take the food into her mouth, then spit it back into the face of the caregiver. R-5's medical condition made it impossible to reason with her about the importance of maintaining nutrition.

16. The CNA assigned to R-5 as her restorative aide would spend up to two hours feeding one meal to her. The CNA would attempt to feed R-5 until her agitation and resistance made it impossible. The CNA would refrigerate the food, then wait for R-5 to calm down. Then the CNA would reheat the food and begin the process again.

17. Because of her Alzheimer's and her difficult behavior during meals, R-5 was identified as at risk for weight loss and dehydration. Harbour Health's care plan for R-5 identified

several strategies for maximizing R-5's caloric intake, and called for consultation with the facility's registered dietician when needed.

18. R-5 was on a no-sodium-added puree diet, taking thickened liquids in place of solid food. Because she tended to consume only 25 to 50 percent of the food offered at meals, the facility offered her 3,252 calories per day at meals, well in excess of the 1,677 to 1,960 calories required to maintain her usual body weight of 120 to 123 pounds. Staff noted that R-5 appeared overwhelmed by large portions of food and began offering her smaller amounts at one time. R-5 was offered fortified cereals and potatoes, and supplements such as Health Shake and Carnation Instant Breakfast. If R-5 showed signs of accepting certain foods, such as eggs, staff would order extra portions of those foods. Snacks were offered between meals, and R-5 was given vitamin C, zinc, and multivitamins with iron to supplement her nutrition. Staff employed items such as a "Nosey Cup," a cup designed to permit its being held near the resident's face without bumping the nose, to ease the feeding process.

19. Harbour Health's standard practice was to weigh residents once per month. If the monthly weights indicated a problem, then Harbour Health would commence weighing the resident on a weekly basis until the problem was resolved. As

noted by Ms. Ashworth, R-5 weighed 127 pounds at her monthly weighing on May 1, 2001. At her next monthly weighing on June 1, 2001, R-5 weighed 123 pounds. At the following monthly weighing on July 2, 2001, R-5 weighed 117 pounds. Ms. Ashworth calculated the weight loss from May 1 to July 2, 2001 as 7.8 percent of R-5's body weight.

20. Noting the weight loss, Harbour Health placed R-5 on weekly weights in July 2001. On July 16, 2001, her weight remained at 117 pounds. On July 23, 2001, her weight had increased to 123 pounds. On August 1, 2001, R-5's weight was 125 pounds. Thus, by early August R-5 had regained nearly all of the weight she had lost between May and July 2001.

21. On July 6, 2001, R-5's attending physician prescribed Risperdal, an antipsychotic medication, to calm her severe agitation and constant movement. Risperdal can act as an appetite stimulant. The administration of Risperdal to R-5 coincided with her weight gain in July 2001.

22. When the facility became aware of R-5's weight loss in July 2001, staff began offering R-5 food more often, including more snacks between meals. The attending physician removed the sodium restriction from R-5's puree diet. Aside from those steps, Harbour Health maintained the same nutritional procedures for R-5.

23. The agency alleged that Harbour Health was deficient in not involving the consulting dietician when it became aware of R-5's weight loss. The agency further alleged that Harbour Health should have ordered a psychiatric consultation and a speech therapy consultation. Regular snacks should have been ordered, and R-5's medications should have been adjusted.

24. Harbour Health contended that it was already doing everything possible to ensure R-5's nutritional status. The only alternative to the puree diet would be tube feeding. R-5's son, who acted as her guardian, made it clear to the facility that he would not consent to tube feeding.

25. In May 2001, R-5 suffered from an upper respiratory infection diagnosed as bronchitis by her attending physician. On May 14, 2001, the physician ordered the antibiotic Levaquin; nebulizer treatments with Albuterol and Atrovent, both bronchodilators; and oral administration of Robitussin. All of these medications were ordered and administered for a period of one week.

26. Harbour Health contended that R-5's respiratory infection completely explained her weight loss. The evidence does not entirely support that contention. The medical records indicate that R-5's condition was largely resolved by the latter part of May 2001. R-5 lost four pounds during the month of May 2001. The majority of R-5's weight loss occurred during the

month of June 2001, after her bronchitis was treated and apparently resolved. At most, R-5's weight loss was only partially explained by her upper respiratory infection.

27. Dr. Michael Brinson, R-5's attending physician, testified that it is expected that an end-stage Alzheimer's patient will lose weight, because at some point the resident loses the will to live. In Dr. Brinson's opinion, R-5 had reached this point, which explained her refusal to eat. He was aware of R-5's weight loss. Given R-5's clinical condition, the weight loss did not concern Dr. Brinson, who deemed it irrelevant to her care and treatment. Even Ms. Ashworth, the agency RN who performed the survey observation of R-5, agreed that weight loss can be a symptom of end-stage Alzheimer's.

28. R-5 had been provided with a speech consultation and speech therapy in 1998. She was discharged from speech therapy in March 1998 because it was determined that nothing more could be done for her.

29. Dr. Brinson testified that a speech therapy consultation would have been useless in July 2001. Speech therapy is called for if the resident's refusal to eat is related to a swallowing problem. R-5 had no swallowing problem. Catherine Rolin, the restorative nurse who supervised R-5's

feedings, confirmed that there were no indications R-5 had difficulty swallowing, or had choked or aspirated during the time she was losing weight.

30. Dr. Brinson opined that R-5's terminal diagnosis with end-stage Alzheimer's disease made a psychiatric consultation of no value. R-5's cognitive impairment would have rendered her unable to participate in any psychiatric examination.

31. Dr. Brinson came to the facility at least once a week. His Advanced Registered Nurse Practitioner ("ARNP"), Vickie Swank, came to the facility several times a week. Dr. Brinson would have had to order any psychiatric or speech therapy consultation, or any laboratory work. Dr. Brinson believed that none of these was appropriate for R-5.

32. The interdisciplinary team overseeing R-5's care included the facility's certified dietary manager. The team was aware of R-5's weight loss as of July 2, 2001, and decided that R-5's status did not trigger a need to consult the registered dietician.

33. Deborah Blackburn, a dietician and expert in nutrition, reviewed R-5's records and concluded that there was no need to consult a registered dietician. Ms. Blackburn opined that the facility was taking all reasonable steps to maintain R-5's caloric intake and nutritional status. She could not think of a workable approach that Harbour Health had failed to employ.

34. Aside from the weight loss itself, R-5 suffered no skin breakdown or other negative effects.

35. Viewing the evidence in its entirety, it is found that AHCA failed to prove the elements of Tag F325 by a preponderance of the evidence. R-5 lost the weight then quickly gained most of it back with no dramatic changes in Harbour Health's approaches to her feeding and overall nutrition. This fact demonstrates that R-5's weight loss was caused not by Harbour Health's failure to provide adequate nutrition, but by a combination of R-5's terminal Alzheimer's disease and her upper respiratory infection. Once Harbour Health became aware of the weight loss, it reacted appropriately and successfully. The steps that the agency faulted Harbour Health for failing to take--psychiatric consultation, speech therapy consultation, dietician consultation, and medication adjustments--were demonstrated to be unnecessary in light of R-5's condition.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

37. AHCA is authorized to license nursing home facilities in the State of Florida, and pursuant to Chapter 400, Part II, Florida Statutes, is required to evaluate nursing home

facilities and assign ratings. Section 400.23(7), Florida Statutes, requires AHCA to "at least every 15 months, evaluate all nursing home facilities and make a determination as to the degree of compliance." AHCA's evaluation must be based on the most recent inspection report, taking into consideration findings from official reports, surveys, interviews, investigations, and inspections. AHCA must assign either a standard or conditional rating to each facility after it surveys the facility. Section 400.23(7), Florida Statutes.

38. The Agency has the burden to establish the allegations that would warrant the imposition of a conditional license.

Beverly Enterprises-Florida v. Agency for Health Care Administration, 745 So. 2d 1133 (Fla. 1st DCA 1999). AHCA must show by a preponderance of the evidence that there existed a basis for imposing a conditional rating on Harbour Health's license. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

39. As to the allegations of the Administrative Complaint, the standard of proof for imposition of an administrative fine is clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932, 935 (Fla. 1996).

40. Section 400.23, Florida Statutes, provides in pertinent part:

(7) The agency shall, at least every 15 months, evaluate all nursing home facilities and make a determination as to the degree of compliance by each licensee with the established rules adopted under this part as a basis for assigning a licensure status to that facility. The agency shall base its evaluation on the most recent inspection report, taking into consideration findings from other official reports, surveys, interviews, investigations, and inspections. The agency shall assign a licensure status of standard or conditional to each nursing home.

* * *

(b) A conditional licensure status means that a facility, due to the presence of one or more class I or class II deficiencies, or class III deficiencies not corrected within the time established by the agency, is not in substantial compliance at the time of the survey with criteria established under this part or with rules adopted by the agency. If the facility has no class I, class II, or class III deficiencies at the time of the followup survey, a standard licensure status may be assigned.

41. Section 400.23(8)(b), Florida Statutes, defines a Class II deficiency as:

a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. A class II deficiency is subject to a civil penalty of \$2,500 for an isolated

deficiency, \$5,000 for a patterned deficiency, and \$7,500 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last annual inspection or any inspection or complaint investigation since the last annual inspection. A fine shall be levied notwithstanding the correction of the deficiency.

42. The October 2001 survey of Harbour Health included one deficiency identified as Tag F325 (violation of 42 C.F.R. Section 483.25(i)(1), relating to maintenance of acceptable parameters of nutritional status). This deficiency was identified as Class II and thus subjected the facility to conditional licensure. Because the deficiency was isolated, the agency seeks to impose a \$2,500 fine.

43. The preponderance of the evidence failed to establish that the cited deficiency occurred. The evidence presented at hearing failed to establish that the resident's weight loss was not fully addressed by the facility. The agency's criticisms focused purely on the resident's weight loss, without taking into account her individual circumstances. Such considerations as ordering a psychiatric consultation simply made no sense for a resident suffering end-stage Alzheimer's disease. Further, the resident quickly regained the lost weight with only minimal changes in the nutritional approaches employed by the facility,

leading to the logical conclusion that her weight loss was not caused by Harbour Health's care.

44. The burden of proof on AHCA as to the phase of the proceeding involving the Administrative Complaint was to demonstrate the truthfulness of the allegations in the complaint by clear and convincing evidence. Osborne Stern; Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

45. The "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

46. Given the conclusion that the Agency failed to establish the deficiency alleged in the October 2001 survey by a preponderance of the evidence, it must follow that the more exacting standard of clear and convincing evidence has not been met.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Agency for Health Care Administration enter a final order dismissing the Administrative Complaint in

DOAH Case No. 02-1299, and rescinding the notice of intent to assign conditional licensure status to Harbour Health Center in DOAH Case No. 02-0949 and reinstating the facility's standard licensure status.

DONE AND ENTERED this 23rd day of September, 2002, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of September, 2002.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.